Pang Chuan Cheong & Ors v Oh Kwong Foi & Ors

HIGH COURT (KUANTAN) — APPLICATION FOR JUDICIAL REVIEW NO JR-04 OF 2005-I
CLEMENT SKINNER J
4 APRIL 2007

Succession — Letters of Administration — Grants to next-of-kin — Whether proper for deceased's next-of-kin to apply — Whether next-of-kin ranked higher

Succession — Distribution of estate — Intestate — Stepson — Whether entitled to share in deceased's estate

Administrative Law — Judicial Review — Certiorari and Mandamus — Whether order for mandamus and certiorari ought to be granted

Administrative Law — Natural justice — Breach — Whether first respondent acted in breach of rules of natural justice

This was the hearing by the applicants for an order of certiorari to quash the decision of the first respondent made on 31 December 2004 in his capacity as a Probate Officer, Sarawak in not allowing the applicant's application to be granted Letters of Administration ('LA') to the estate of Tan Kim Heng ('the deceased'). The applicants are the natural children of the marriage between Henry Pang and Ng Nyuk Lan ('the principal wife'). Subsequently, under Chinese custom, Henry took a second wife ('the deceased') and their marriage was registered on 23 August 1985 pursuant to s 33 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). The deceased was killed in an accident with her husband and did not leave a will. The applicants adduced evidence in their affidavit that the marriage between the late Henry Pang and his two wives was a harmonious one and the deceased was accepted as part of the family. On 31 December 2004, the first applicant submitted his application for LA of the estate of the deceased and discovered that the deceased had been survived by her brother and sisters. The first respondent explained to the first applicant that he was the deceased's stepson and that her next of kin ranked higher than he did and thus were more eligible to be granted LA. Nevertheless, the first applicant's application was accepted subject to the matter being referred to Amanah Raya Berhad for eligibility to apply for a grant. The first applicant was advised to write in officially claiming that he was entitled to be a beneficiary and also the administrator of her estate, which he did. Subsequently, the deceased's brother ('Peter Tan') applied for LA. Following this, the first respondent wrote to the first applicant stating that Peter Tan was higher ranking and that LA would be granted to him. To this, the first applicant argued that he was the rightful 'male heir' of the deceased by virtue of s 8

of the Sarawak Administration of Estates Ordinance. The first applicant also stated that Peter and his sisters were not the natural siblings of the deceased. Further, the applicants argued that the first respondent had, inter alia, exercised his power unreasonably, was wrong and biased, made the decision in breach of natural justice, failed to take into account relevant matters and misinterpreted the law and made the decision not based on the merits. The issues for determination were: (i) whether the decision of the first respondent was proper or was liable to be quashed; and (ii) whether an order for mandamus should be granted.

Held, refusing the order of mandamus by the applicants:

(1) The decision of the first respondent could not be attacked for procedural unfairness. The first respondent explained that on learning from the first applicant that he was only the stepson of the deceased who had died leaving a brother and two sisters surviving her as her next of kin, he had explained to the first applicant that they were the persons of higher ranking and more eligible than the first applicant to be granted administration. There was no summary rejection of the application on 31 December 2004 as alleged. The first respondent only made a decision on the first applicant's application on 28 January 2005 (see paras 25, 26, 29).

(2) The first respondent had also not been guilty of the matters complained of. He was quite aware of the basis on which each of the applicants for administration were making their applications; he had seen and had also listened to the first applicant as well as afforded him an opportunity to state his position in the letter of 3 January 2005. The first respondent could not have been said to have acted in breach of the rules of natural justice in arriving at his decision. So too regarding the allegation of bias. The first respondent had referred the question of the first applicant's eligibility to be granted administration to his legal department for advice before arriving at his decision. This did not indicate a biased mind (see paras 33, 34).

(3) There was nothing in the point that in arriving at his decision on 28 January 2005, the first respondent had acted on incorrect or misleading information contained in a document filed in support of Peter Tan's application, ie, the Church's letter regarding the marital status of the deceased at the date of her death. While it was correct that the Church had written such a letter, it must not have been overlooked that the first respondent was aware from at least 3 January 2005 when he received the first applicant's letter that the deceased was married to the late Henry Pang as stated in the letter which position the first respondent fully accepted, even before the Church wrote to rectify the matter. The first respondent explained that that was why in his letter of 28 January 2005, he had informed the first applicant that he (the first respondent) had considered the provisions of the LRA and had stated that while the first applicant could be considered as the 'child of the marriage' within the meaning of that term in that enactment, the brother of the deceased was still of higher ranking when applying for administration (see para 35).

(4) The first respondent had not exceeded his jurisdiction. Concerning the letter of 28 January 2005, it was as obvious to the applicants that when the first

respondent made reference to the first applicant's position as a beneficiary to the estate, he was merely responding to the assertion made in the first applicant's letter of 3 January 2005 that he was a 'son' and accordingly a beneficiary of the deceased's estate. As far as these proceedings were concerned, it was the applicants who had sought a declaration that they were the beneficiaries of the deceased's estate and the respondents were responding to the application. The respondent had not made any decision on the matter in excess of jurisdiction (see paras 36, 37).

(5) The submission that an adverse inference should be drawn against the respondents for failure to clarify the issue of Peter Tan not being the blood relatives of the deceased was misplaced. It was not open to the applicants to take this point. The first applicant's allegation was made well after leave to bring this application was granted. It was not a ground relied on for the grant of leave to bring this application and was only introduced for the first time on 14 May 2005 in the course of these proceedings and well after the first respondent had made his decision on 28 January 2005. Even if the applicants were allowed to take the point, when the first respondent made his decision on 28 January 2005 he had already been informed by the first applicant at their meeting on 31 December 2004 that the deceased died leaving surviving siblings as her next of kin, and the first respondent had received the application of Peter Tan by 28 January 2005. There was thus nothing before the first respondent when he made his decision, to put him on any enquiry regarding the relationship between the deceased and her siblings (see para 38).

(6) The court did not agree with the contention that the first respondent had failed to take into account irrelevant matters. The case of Re Tan Soh Sim (deceased) [1951] MLJ 21 was of no assistance to the applicants because succession to an intestate estate in Sarawak is governed by express legislation, ie, the Distribution Act 1958. Likewise, in determining who was entitled to be granted administration of the deceased's intestate estate, since there was express legislation on the matter under the Ordinance, the first respondent did not err when he did not take Chinese custom into account when arriving at his decision (see paras 44, 46), Re Tan Soh Sim (deceased) [1951] MLJ 21 distinguished.

(7) The word 'heir' must be interpreted and take its meaning from the context in which it is used or found. In this case the word 'heir' did not fall to be interpreted in the context of a will but in the context of a person dying intestate. The word 'heir' was found in a statute (the Ordinance) dealing with the due and proper administration of the estate of deceased persons and used in the context of s 8 which directs who has priority to be granted letters of administration of a person who dies intestate. Accordingly, the words 'male heirs' were used in s 8 of the Ordinance to denote the persons whom by law would succeed to the property of a deceased person in the case of intestacy under a statute of distribution. The court should look at who are the persons appointed by law to succeed to the estate in case of intestacy. The statute that governed the distribution of the estate of a person who dies intestate is the the DAwhich applied to Sarawak. Section 6 of the Distribution Act sets out the persons in their order of priority of who can share in the distribution of

property of a person who dies intestate. As far as it was relevant to the facts of this case, the 'issue' of a deceased as well as the 'brothers and sisters' of a deceased are persons who can share in the distribution of the estate of a deceased who dies intestate, except that his or her 'issues' enjoy a higher priority (see paras 73, 74).

(8) The term 'issue' as defined in s 3 of the Distribution Act included children and the descendants of deceased children and also included a child who is adopted under the provisions of the Adoption Act 1952 or the Adoption Ordinance of Sarawak. Thus, it must follow that a blood-relationship was not a prerequisite before a person can be regarded as an 'issue' of a deceased person under the Distribution Act 1958. Just because the applicants said that he was a 'child of the marriage' under the Law Reform (Marriage and Divorce) Act 1976, it does not follow that he must also be a 'child' of the deceased under the Distribution Act and hence her 'issue'. The Law Reform (Marriage and Divorce) Act and the Distribution Act served completely different functions and purposes. Given this, it would be wrong to use a definition which served the purposes of one enactment and apply it to the other. This also applied with equal force to the submission that the 'child' in s 7(11) of the Civil Law Act 1956 should be used to interpret the word 'child' in the Distribution Act (see paras 75, 77, 78).

(9) There was a fundamental flaw in the way the applicants have interpreted s 5 of the Distribution Act. That section referred to those who were related to the deceased through his or her father or mother, eg, the deceased's grandparents, aunts, uncles, great grandparents, etc. It was clear that the words 'his' and 'him' in s 5 referred to the deceased person, but the applicants here had chosen to construe the words 'his' or 'him' as referring to the first applicant or themselves and went on to argue that since they were related to the deceased through their late father who was married to her, they were her issue. Such an interpretation and argument was untenable (see para 80).

(10) The legislature had expressly defined in s 3 of the Distribution Act the category of persons who may be regarded as a 'child' of the deceased for the purposes of the Distribution Act. A stepchild was not mentioned in the definition at all. In the face of such exclusion it would not be right to read into the section a category of persons who are not there (see para 81).

(11) A case had not been made out by the applicants for an order of certiorari to issue. The first respondent had not been guilty of any procedural impropriety in arriving at his decision and neither was he wrong in saying that the brother of the deceased enjoyed a higher ranking than the first applicant in applying for administration (see para 85).

[Bahasa Malaysia summary

Ini adalah pendengaran oleh pemohon-pemohon untuk satu perintah certiorari bagi membatalkan keputusan oleh responden pertama yang dibuat pada 31 Disember 2004 atas kapasitinya sebagai Pegawai Probet, Sarawak kerana tidak membenarkan permohonan pemohon untuk diberikan Suratkuasa Mentadbir ('SM') kepada estet Tan Kim Heng ('si mati'). Pemohon-pemohon merupakan anak kandung daripada perkahwinan antara Henry Pang dan Ng Nyuk Lan (isteri utama). Kemudiannya,

di bawah adat resam Cina, Henry telah mengambil isteri kedua (si mati) dan perkahwinan mereka telah didaftarkan pada 23 Ogos 1985, menurut s 33 Akta Undang-undang Memperbaharui (Pernikahan dan Penceraian) 1976. Si mati telah terbunuh dalam satu kemalangan jalanraya dengan suaminya dan tidak meninggalkan wasiat. Pemohon-pemohon telah mengemukakan keterangan dalam afidavit-afidavit mereka bahawa perkahwinan antara mendiang Henry Pang dan kedua-dua isterinya adalah bahagia dan si mati diterima sebagai sebahagian daripada keluarga. Pada 31 Disember 2004, pemohon pertama menyerahkan permohonannya untuk SM kepada estet si mati dan mendapati bahawa si mati meninggalkan seorang adik-beradik lelaki dan adik-beradik perempuan. Responden pertama menerangkan kepada pemohon pertama bahawa beliau adalah anak tiri si mati dan warisnya mempunyai kedudukan yang lebih tinggi daripadanya dan dengan itu mereka lebih berhak untuk diberikan SM. Walaupun begitu, permohonan pemohon pertama diterima tertakluk kepada perkara ini dirujuk kepada Amanah Raya Berhad untuk kelayakan memohon mendapatkan geran. Pemohon pertama telah dinasihatkan, yang mana dia berbuat demikian, untuk menulis secara rasmi menyatakan bahawa dia berhak untuk menjadi benefisiari dan juga pentadbir kepada estetnya. Kemudiannya, adik lelaki si mati ('Peter Tan') memohon SM. Berikutan ini, responden pertama menulis kepada pemohon pertama menyatakan bahawa Peter Tan adalah lebih tinggi kedududkannya dan SM akan diberikan kepadanya. Untuk ini, pemohon pertama menegaskan bahawa dia adalah 'waris lelaki' si mati yang sah mengikut s 8 Ordinans Pentadbiran Estet-estet Sarawak. Pemohon pertama juga menyatakan bahawa Peter dan adik-adiknya bukan adik beradik kandung kepada si mati. Selanjutnya, pemohon-pemohon mempertikaikan bahawa responden pertama telah, antara lain, tidak menggunakan kuasanya dengan munasabah, adalah salah dan berat sebelah, membuat keputusan dengan melanggar keadilan asasi, telah gagal mengambilkira perkara-perkara yang sepatutnya dan tersalah tafsir perundangan dan membuat keputusan tidak berdasarkan kepada merit. Isu-isu yang perlu ditentukan adalah (1) sama ada keputusan responden pertama adalah betul atau patut dibatalkan dan (ii) sama ada perintah mandamus harus diberikan.

Diputuskan, menolak perintah *mandamus* oleh pemohon-pemohon:

(1) Keputusan responden pertama tidak akan diganggu kerana ketidakadilan prosedural. Responden pertama menjelaskan bahawa setelah mengetahui daripada pemohon pertama bahawa dia hanyalah anak tiri kepada si mati yang telah mati meninggalkan seorang adik lelaki dan dua orang adik perempuan sebagai waris-waris kadim, dia menjelaskan bahawa mereka adalah orang yang mempunyai kedudukan yang lebih tinggi dan lebih layak daripada pemohon pertama untuk diberikan kuasa mentadbir. Tiada penolakkan terus permohonan tersebut pada 31 Disember 2004 sebagaimana didakwa. Responden pertama hanya membuat keputusan ke atas permohonan pemohon pertama pada 28 Januari 2005 (lihat perenggan 10,12)

(2) Responden pertama juga tidak bersalah di atas laporan perkara yang telah dikatakan. Dia mengetahui akan asasnya kepada permohonan setiap pemohon-pemohon untuk kuasa mentadbir, dia juga telah melihat dan mendengar pemohon pertama dan juga memberikannya peluang menyatakan kedudukannya melalui surat bertarikh 3 Januari 2005. Responden pertama

tidak boleh dikatakan telah melanggar kaedah-kaedah keadilan asasi dalam membuat keputusannya. Dan juga berkenaan dakwaan berat sebelah. Responden pertama telah merujuk persoalan berkenaan kelayakkan pemohon pertama untuk diberikan kuasa mentadbir kepada jabatan perundangannya untuk nasihat sebelum membuat sebarang keputusan. Ini tidak menunjukkan sebarang tanda-tanda untuk berat sebelah (lihat perenggan 13).

(3) Tiada terdapat sebarang maksud bahawa ketika membuat keputusannya pada 28 Januari 2005, responden pertama telah bertindak atas maklumat yang tidak tepat dan menyimpang yang terdapat dalam dokumen yang difailkan sebagai menyokong permohoan Peter Tan iaitu surat Gereja berkenaan status perkahwinan si mati dan tarikh kematiannya. Memang betul bahawa pihak Gereja telah menulis surat tersebut, ia tidak sepatutnya terlepas pandang bahawa responden pertama juga mempunyai berpengetahuan sekurang-kurangnya pada 3 Januari 2005 apabila dia menerima surat responden pertama menyatakan bahawa si mati telah berkahwin dengan mendiang Henry Pang sebagaimana tersebut dalam surat yang mana responden pertama telahpun menerimanya, walaupun sebelum pihak Gereja menulis bagi membetulkan perkara tersebut. Responden pertama menerangkan bahawa kenapa dalam suratnya bertarikh 28 Januari 2005, dia telah memaklumkan pemohon pertama bahawa dia (responden pertama) telah menimbangkan peruntukkan-peruntukkan dalam Akta Undang-undang Memperbaharui (Pernikahan dan Penceraian) 1976 dan menyatakan bahawa pemohon pertama boleh dikatakan sebagai 'anak hasil daripada perkahwinan' seperti maksud istilah dalam enakmen, adik si mati masih lagi mempunyai kedudukan yang tinggi bila memohon kuasa mentadbir (lihat perenggan 14).

(4) Responden pertama tidak sesekali melebihi bidangkuasanya. Berikutan surat bertarikh 28 Januari 2005, ia adalah jelas kepada pemohon-pemohon bahawa bila responden pertama membuat rujukan kepada kedudukan pemohon pertama benefisiari kepada estet, dia telah membalas kepada pernyataan yang dibuat dalam surat pemohon pertama bertarikh 3 Januari 2005 bahawa dia adalah "anak lelaki'dan selanjutnya adalah benefisiari kepada estet si mati. Jika menurut kepada prosiding-prosiding ini, ia adalah pemohon-pemohon yang memohon satu deklarasi bahawa mereka adalah benefisiari-benefisiari kepada estet si mati dan responden telah memberikan maklumbalas kepada permohonan itu. Responden tidak membuat sebarang keputusan dalam perkara ini yang melebihi bidangkuasanya (lihat perenggan 14, 15).

(5) Hujahan bahawa penyimpulan bertentangan yang digambarkan terhadap responden-responden atas kegagalan menjelaskan isu Peter Tan yang bukan saudara sedarah kepada si mati adalah tidak kena pada tempatnya. Ia tidak terbuka kepada pemohon-pemohon untuk menggunakan hujah ini. Dakwaan pemohon pertama telah dibuat selepas kebenaran membawa permohonan ini diberikan. Ia bukan alasan yang digunakan untuk memberikan kebenaran bagi membawa permohonan ini dan hanya diperkenalkan buat kali pertama pada 14 Mei 2005 dalam prosiding-prosiding ini dan selepas responden pertama membuat keputusannya pada 28 Januari 2005. Walaupun jika pemohon-pemohon dibenarkan menggunakan hujahan ini, bila responden pertama membuat keputusannya pada 28 Januari 2005 dia telahpun

dimaklumkan oleh pemohon pertama pada mesyuarat mereka pada 31 Disember 2004 bahawa si mati meninggalkan anak-anaknya sebagai waris kadim, dan responden pertama telah menerima permohonan Peter Tan pada 28 Januari 2005. Oleh itu tiada terdapat apa-apa di hadapan responden pertama semasa dia membuat keputusan, bagi meletakkan ke atasnya pertanyaan berkenaan hubungannya antara si mati dan anak-anaknya (lihat perenggan 15, 16).

(6) Mahkamah tidak bersetuju dengan kenyataan responden pertama bahawa dia telah gagal untuk mengambilkira perkara-perkra tidak relevan. Kes *Re Tan Soh Sim (deceased)* [1951] MLJ 21 tidak dapat membantu pemohon-pemohon kerana pewarisan di Sarawak ditetapkan oleh perundangan jelas iaitu Akta Pembahagian 1958. Dan juga, dalam menentukan siapa yang layak diberikan kuasa mentadbir kepada estet tiada berwasiat si mati, memandangkan terdapat perundangan jelas mengenai perkara ini di bawah Ordinans, responden pertama tidak terkhilaf bila dia tidak menggunakan adat resam Cina dalam pertimbangannya semasa membuat keputusan (lihat perenggan 18). *Re Tan Soh Sim (deceased)* [1951] MLJ 21 dibezakan.

(7) Perkataan 'waris' hendaklah ditafsirkan dan mengambil maknanya daripada konteks yang ia selalunya digunakan atau perolehi. Dalam kes ini perkataan "waris' tidak termasuk dalam maksud konteks wasiat tetapi dalam konteks seseorang yang mati tanpa wasiat. Perkataan 'waris' didapati dalam statut (Ordinans) yang berurusan dengan pentadbiran sewajarnya dan sesuai berkenaan dengan estet seseorang yang mati dan digunakan dalam konteks s 8 yang mengarahkan sesiapa mempunyai keutamaan untuk diberikan suratkuasa mentadbir kepada seseorang yang mati tanpa wasiat. Maka, perkataan 'waris lelaki' telah digunakan dalam s 8 Ordinans yang melambangkan seseorang di sisi undang-undang yang akan mewarisi harta si mati dalam keadaan tanpa wasiat di bawah statut pembahagian. Mahkamah seharusnya melihat siapakah orang-orang yang telah dilantik oleh undang-undang untuk mewarisi estet si mati dalam keadaan tanpa wasiat. Statut yang menentukan pembahagian estet si mati tanpa wasiat adalah Akta Pembahagian 1958 yang terpakai kepada Sarawak. Seksyen 6 Akta Pembahagian memberikan orang-orang dalam turutan kedudukan yang akan berkongsi pembahagian harta si mati tanpa wasiat. Berdasarkan relevannya kepada kes ini, 'zuriat' si mati dan "adik lelaki dan adik-beradik perempuan' kepada si mati adalah orang yang boleh berkongsi dalam pembahagian estet si mati yang mati tanpa wasiat, melainkan 'zuriatnya' menikmati keutamaan yang lebih tinggi (lihat perenggan 30,31,32).

(8) Istilah "zuriat' sebagaimana didefinisikan dalam s 3 Akta Pembahagian juga termasuk anak-anak dan keturunan anak-anak simati dan juga termasuk anak angkat di bawah peruntukkan Akta Pengambilan Anak Angkat 1952 atau Ordinans Pengambilan Anak Angkat Sarawak. Oleh itu, ia mesti diikuti bahawa pertalian darah adalah bukan prasyarat sebelum seseorang boleh dianggap sebagai 'zuriat' kepada si mati di bawah Akta Pembahagian 1958. Hanya kerana pemohon mengatakan bahawa dia adalah 'anak hasil daripada perkahwinan' di bawah Akta Memperbaharui (Perkahwinan dan Penceraian) 1976, ia tidak semestinya bahawa dia adalah 'anak' kepada si mati di bawah Akta Pembahagian dan oleh itu adalah 'zuriatnya'. Akta Memperbaharui

(Perkahwinan dan Penceraian) dan Akta Pembahagian digunakan untuk fungsi-fungi dan tujuan-tujuan yang berlainan. Berdasarkan ini, ia adalah salah menggunakan definisi yang digunakan untuk sesuatu enakmen dan menggunakannya untuk sesuatu yang lain. Ia terpakai dengan kekuatan yang sama kepada penghujahan bahawa 'anak' dalam s 7(11) Akta Undang-undang Sivil 1956 yang sepatutnya digunakan untuk mentafsirkan perkataan 'anak' dalam Akta Pembahagian (lihat perenggan 32, 33).

(9) Terdapat kecacatan asas dengan cara pemohon-pemohon mentafsirkan s 5 Akta Pembahagian. Seksyen tersebut merujuk kepada sesiapa yang ada hubungan dengan si mati melalui ayahnya atau emaknya, iaitu datuk-datuk dan nenek-nenek si mati, ibu-ibu saudara, bapa-bapa saudara, moyang-moyang dan dll. Ia adalah jelas bahawa perkataan 'his' dan 'him' dalam s 5 merujuk kepada si mati, tetapi pemohon-pemohon di sini telah memilih untuk mentafsirkan perkataan 'his' dan 'him' sebagai merujuk kepada pemohon pertama dan diri mereka dan selanjutnya mempertikaikan bahawa memandangkan mereka ada hubungan dengan si mati melalui mendiang ayah mereka yang telah berkahwin dengannya, mereka adalah zuriatnya. Pentafsiran dan perdebatan sebegitu tidak dapat dipertahankan (lihat perenggan 34).

(10) Badan perundangan telah memberikan definisi dalam s 3 Akta Pembahagian kategori orang-orang yang dianggap sebagai 'anak' kepada si mati bagi tujuan Akta Pembahagian. Anak tiri tidak disebut sama sekali dalam definisi. Dalam pengecualian ia adalah tidak benar untuk membaca dalam seksyen orang-orang yang tidak berada disitu (lihat perenggan 35).

(11) Kes ini tidak berjaya dibentangkan oleh pemohon-pemohon untuk satu perintah certiorari bagi zuriat. Responden pertama tidak bersalah untuk sebarang prosedural yang sesuai ketika membuat keputusan dan dia juga tidak salah dalam mengatakan bahawa adik kepada si mati mempunyai kedudukan yang lebih tinggi daripada pemohon pertama dalam memohon kuasa mentadbir (lihat perenggan 38).]

Notes

For the case on grants to next-of-kin, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2291.

For cases on distribution of estate, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2153–2165.

For cases on breach of natural justice, see 1*Mallal's Digest* (4th Ed, 2005 Reissue) paras 221–226.

For the case on certiorari and mandamus, see 1*Mallal's Digest* (4th Ed, 2005 Reissue) para 209.

Cases referreed to

NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd 1987] 1 MLJ 39 (refd)

R v Loxdale (1758) 97 ER 394 (refd)

Tan Soh Sim, Deceased; Chan Lam Keong & Ors v Tan Saw Keow & Ors, Re [1951] MLJ 21 (refd)

Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd & Ors Appeal [2004] 3 MLJ 17 (refd)

Legislation referred to

Bank Simpanan Nasional Berhad Act 1997
Banking and Financial Institutions Act 1989
Civil Law Act 1956 s 7(11)
Development Financial Institutions Act 2002
Distribution Act 1958 ss 3, 5, 6
Employees Provident Fund (Conduct and Discipline) Rules 1993
Employees Social Security Act 1969
Income Tax Act 1967 s 48(9)
Insurance Act 1996
Law Reform (Marriage and Divorce) Act 1976 s 33
Pensions Act 1980
Pensions Adjustment Act 1980
Sarawak Administration of Estates Ordinance s 8
Sri Pahlawan Gagah Perkasa (Remembrance Allowance) Act 1990
Stamp Duty (Remission) (No 7) Order 2002

Grace Pang (Grace Pang Advocates) for the applicants
Siti Rafizah Mahadzir (Azmanira Ariff with her) (Amanah Raya Bhd) for the respondents

Clement Skinner J:

[1] This is the hearing of an application by Pang Chuan Cheong, Teresa Pang Su Eing, Grace Pang Su Chene and Frederick Pang Chuan Viet ('the applicants') for an order of certiorari to remove to this court for it to be quashed, the decision of the first respondent made on 31 December 2004, in his capacity as the Probate Officer, Sarawak, rejecting the first applicant's application to be granted Letters of Administration to the estate of Tan Kim Eng ('the deceased Tan Kim Eng').

[2] In addition, the applicants also seek the following relief:

(a) A declaration that they are the children of the marriage between the deceased, Tan Kim Eng and Henry Pang Chaw Hiung also now deceased (hereafter 'the late Henry Pang'). Such declaration is sought pursuant to s 2 of the Law Reform (Marriage and Divorce) Act 1976;

(b) A declaration that the applicants are the issue of the deceased, Tan Kim Eng and the beneficiaries of her estate pursuant to s 3 and s 5 of the Distribution Act 1958;

(c) A declaration that the first applicant is the male heir of the deceased, Tan Kim Eng and that he has the legal right and is entitled to the grant of Letters of Administration of her estate by virtue of s 8 of the Sarawak Administration of Estates Ordinance(Cap 80);

(d) An order of mandamus directed to the first respondent as Probate Officer, Sarawak, requiring him to exercise the jurisdiction conferred on him to issue the grant of Letters of Administration to the first applicant to administer the estate of the deceased, Tan Kim Eng.

A **[3]** The facts leading up to this application are these.

[4] The late Henry Pang married Ng Nyuk Lan (hereafter 'the principal wife) on 1 January 1970 according to Chinese custom. The four applicants are the natural children of that marriage.

B

[5] On 15 January 1982, the late Henry Pang in the exercise of his personal rights under Chinese custom took a secondary wife and married Tan Kim Eng, which marriage was subsequently registered on 23 August 1985 pursuant to s 33 of the Law Reform (Marriage and Divorce) Act 1976('the LRA').

C

[6] There are no children from the marriage between the late Henry Pang and the deceased Tan Kim Eng.

[7] While the late Henry Pang and Tan Kim Eng were holidaying in Cameron **D** Highlands on 21 December 2004, the coach in which they were travelling veered off the road and ended up in a ravine. Both Henry Pang and Tan Kim Eng died as a result of the accident. It is not in dispute that when she died, Tan Kim Eng did not leave a will. Accordingly, she died intestate.

E **[8]** The affidavit evidence adduced by the applicants at this hearing, shows that the marriage between the late Henry Pang and his two wives was a harmonious one. The secondary wife, Tan Kim Eng was fully accepted in every aspect as a member of the Pang family according to the Chinese custom. She addressed the principal wife as 'Ah Ceh' in Hokkien or 'elder sister' in accordance with how a secondary wife **F** would address a principal wife in Chinese custom and all the applicants, being children of the first marriage addressed the secondary wife as 'Ah Yi' which means stepmother in the Chinese custom. The children of the applicants addressed the secondary wife as 'Poh Poh' or 'Grandma' in Hokkien.

G **[9]** The applicants also cited other instances which they say demonstrated that the secondary wife had been fully accepted into the Pang family, while she in turn had fully accepted all the applicants and the principal wife (who is still living today), as members of her immediate family. Thus, the applicants say that when they were younger the secondary wife used to take them out for picnics and outings during weekends and school holidays; that during special occasions like Chinese New Year **H** and family birthdays or reunion dinners she would celebrate the occasion together with the applicants and their parents; that during the first applicant's wedding in 1999, she attended the Tea Ceremony and was served tea by the first applicant and his wife; that when the third applicant was admitted to the Sarawak Bar as an Advocate, she attended the family dinner in celebration; that she had jointly **I** purchased a house with the first applicant at No 171 Taman Aichi, Jalan Matang, Kuching in 1992; that she had nominated the first applicant as her only beneficiary in a Prudential Insurance Policy; that she had assisted the fourth applicant set up a partnership business known as Syarikat Borneo Carrier Service in which she is named as a partner; that she attended the funeral of the applicants' maternal grandmother in 1988, wearing the Chinese customary mourning dress and stood side by side with

the family during the funeral and was included as one of the daughters-in-law in the obituary inserted in the local newspapers. A

[10] A fact relevant to this application must now be mentioned. When the secondary wife, Tan Kim Eng passed away she was survived by a brother and two sisters. B

[11] On 31 December 2004, the first applicant with the consent of the other applicants went to the Probate Office at Kuching to submit his application for Letters of Administration of the estate of Tan Kim Eng. While there, he met the first respondent, the Probate Officer. According to the first respondent, when he found out from the first applicant that the latter was the stepson of the deceased, Tan Kim Eng and that she was survived by a brother and two sisters as her next of kin, the first respondent explained to the first applicant the categories of persons eligible to apply for Letters of Administration according to the Sarawak Administration of Estates Ordinance ('the Ordinance') and in this case the deceased Tan Kim Eng's brother and sisters were the persons who are of higher ranking and more eligible to be granted the Letters of Administration to her estate compared to the first applicant. C D

[12] The first applicant was not satisfied with the first respondent's explanation. The meeting ended with the first respondent accepting the first applicant's application subject to the matter being referred to the Legal Department of Amanah Raya Berhad regarding the first applicant's eligibility to apply for grant of administration. The first applicant was also advised to write in officially on the matter, which the first applicant did on 3 January 2005. In his letter of 3 January 2005 the first applicant stated that being 'the eldest son of the late Henry Pang, the husband of the abovenamed deceased, Tan Kim Eng, and by virtue of my natural father's marriage to the deceased, therefore I am also the 'child of the marriage' of the deceased, Tan Kim Eng as statutorily defined by the Law Reform (Marriage and Divorce) Act 1976'. Accordingly, the first applicant claimed to be a beneficiary of the deceased Tan Kim Eng's estate and as her child, lawfully entitled to be the administrator of her estate. E F G

[13] On 4 Janaury 2005, the first respondent received a telephone call from the lawyers acting for Mr Peter Tan Kim Cheng, the brother of the deceased, Tan Kim Eng enquiring about the grant of administration to her estate. The next day a law firm wrote to the first respondent on behalf of Peter Tan requesting that the application by the first applicant for Letters of Administration to the estate be put on hold failing which legal proceedings would be commenced. On 11 January 2005 the first respondent wrote back to the lawyers of Peter Tan informing them that at that juncture, Letters of Administration had not been granted to anyone. H

[14] On 20 January 2005, the first respondent received an application for grant of Letters of Administration to the estate of Tan Kim Eng from Mr Peter Tan through his lawyers. I

[15] The first respondent then sought advice from his Legal Department on the matter. Having received the advice he sought, the first respondent wrote to the first

A applicant on 28 January 2005 informing him that, upon considering the facts of the case and applying the relevant provisions of the Ordinance, while the first respondent agreed that the first applicant could be considered as the deceased's child for the purposes of and in line with the definition of 'child of the marriage' stated in s 2 of the the LRA, it was still the deceased's brother, ie, Mr Peter Tan who was of higher B ranking and more eligible in order of priority to be granted administration of the estate of Tan Kim Eng, by reason whereof the first applicant's application for administration was thereby rejected.

[16] On 31 January 2005 the first applicant wrote back to the first respondent C stating that being the stepson of the deceased Tan Kim Eng he should be considered as the 'male heir' of the deceased by virtue of s 8 of the Ordinance. In his letter the first applicant also informed the first respondent that the deceased's brother, Mr Peter Tan had wrongly caused the Pastor of St Joseph's Cathedral ('the Church') to issue an inaccurate letter in support of Mr Tan's application for administration in which it was D stated that to the best of the Pastor's knowledge the deceased Tan Kim Eng was at the time of her death, unmarried. To prove his point the first applicant enclosed a copy of the certificate or registration of marriage between the deceased Tan Kim Eng and the late Henry Pang. The first applicant then demanded that he be issued Letters of Administration to Tan Kim Eng's estate failing which he would refer the matter to court.

E

[17] The complaint by the first applicant about Mr Peter Tan causing the Church to issue an inaccurate letter relates to the fact that in support of his application for Letters of Administration of the estate of Tan Kim Eng, Mr Peter Tan had got the Church to sign a letter entitled 'Letter of Next of Kin' in which it was stated, inter F alia, that at the time of her death, the late Tan Kim Eng was unmarried.

[18] Following the first applicant's letter, the first respondent wrote to Mr Peter Tan's lawyers asking for further documents in support of his application for administration including copies of the birth certificates of the deceased as well as G those of Mr Peter Tan and his sisters, which were duly supplied. The Church has since (on 29 January 2005) written to the first respondent informing him that it had been brought to the Pastor's attention that what he had earlier stated about Tan Kim Eng was incorrect and that she was in fact married to the late Henry Pang. Accordingly, the Church wished to rectify the information it gave regarding the H marital status of the late Tan Kim Eng.

[19] In view of the first applicant's institution of legal proceedings, the first respondent has to date not issued the grant of Letters of Administration of the estate of Tan Kim Eng to Mr Peter Tan or anyone else pending the decision in this case.

I

[20] A further matter needs to be mentioned here. In the course of these proceedings, while the first applicant was replying to an affidavit filed by the first respondent, the first applicant asserted in his affidavit affirmed on 14 May 2005 that 'I have been informed by my deceased second mother, her late mother, Wong Ngun Fah and also the brother of my deceased second mother, Peter Tan Kim Cheng and

verily state that all the four siblings of my deceased second mother were not natural children of their late parents and none of them are brothers and sisters of the whole blood to my deceased second mother'.

[21] The first respondent does not accept the assertion of the first applicant regarding the relationship between the deceased Tan Kim Eng and her brother and two sisters. The first respondent's stand on the matter is that the birth certificates of the deceased Tan Kim Eng and her brother and two sisters sufficiently shows that they are brothers and sisters of the whole blood of the deceased Tan Kim Eng ie they are the natural children of their parents named in the birth certificates, namely Tan Kim Chiaw as father and Wong Ngun Fah as mother.

[22] With that I turn to consider the merits of the application before me. The main issues that require determination by this court are:

(a) Whether the decision of the first respondent in refusing to issue the grant of Letters of Administration to the first applicant by his letter dated 28 January 2005 ('the decision') was proper and in accordance to law and if not, whether it should be quashed; and

(b) Whether an order of mandamus should follow

[23] With regard to the first issue, the applicants contend that the decision of the first respondent should be quashed for six reasons, namely, that:

(i) the first respondent exercised his power unreasonably;

(ii) the first respondent was wrong and biased in making his decision;

(iii) the decision was made in breach of the rules of natural justice;

(iv) in making his decision, the first respondent failed to take into account relevant matters;

(v) in making his decision, the first respondent took into account irrelevant matters and misinterpreted the law; and

(vi) the decision was not based on merits of the case

[24] I will consider the applicants' grounds (i), (ii) and (iii) together as they deal with the question of procedural fairness. It is the applicants' complaint that the first respondent had summarily rejected the first applicant's application for administration on the very same day it was submitted, ie, on 31 December 2004. In doing so the first respondent is alleged to have acted unreasonably and shown bias against the applicants. The first respondent is also said to have breached the rules of natural justice in not having afforded the applicants an opportunity to explain their case and to have decided that the first applicant was not eligible to be granted administration at a point in time when the deceased's brother Mr Peter Tan had not even submitted his application for administration. The applicants further complained that when the first respondent later confirmed his earlier decision by his letter of 28 January 2005,

he had done so without making any enquiry into the facts and had relied on incorrect information supplied by the Church regarding the deceased's marital status at her date of death.

[25] Having considered the submissions of the parties as well as the affidavits that have been filed, I do not find that the decision of the first respondent can be attacked for procedural unfairness.

[26] Although the applicants complain that the first respondent had made a decision on the 31 December 2004 itself to reject the first applicant's application, I do not find that to be factually correct. The first respondent has explained that on learning from the first applicant that he was only the stepson of the deceased who had died leaving a brother and two sisters surviving her as her next of kin, he had explained to the first applicant that they were the persons of higher ranking and more eligible than the first applicant to be granted administration. According to the first respondent there was no summary rejection of the first applicant's application on 31 December 2004 as alleged.

[27] I accept the explanation of the first respondent. If the first respondent had made a decision to reject the first applicant's application on 31 December 2004 as alleged, then there would be no need for him to accept the first applicant's application and inform the latter that it was accepted subject to the matter being referred to the Legal Department of the second respondent. Further, a reading of the letter written by the first applicant to the first respondent on 3 January 2005 does not support the allegation that the first respondent had summarily rejected the application on 30 December 2004 as alleged. The first applicant mentioned in his letter that his application had been 'accepted by your good office subject to clarifications from your legal department as to my eligibility to the said application'. The letter also goes on to state why the first applicant believes he is a 'child' or 'son' of the deceased and therefore to be a beneficiary of her estate and to be granted administration of the same. The penultimate paragraph of the letter ends by saying 'As such, I would appreciate if your good office could revert to me on an urgent basis with regard to my said application in order to expedite the distribution of the deceased's assets to the rightful beneficiaries without further delay'.

[28] If there was a rejection of the application on 31 December 2004 as alleged, there would be no reason for the first applicant to state why he should be granted administration and be regarded as a beneficiary. His letter would be directed more towards disputing the first respondent's decision or appealing against it, which it was not. There is nothing in the letter to suggest the first applicant was requesting the first respondent to reconsider his decision either. Further, if there had been a rejection as alleged, I would expect the applicant's letter to make some reference to the decision or express dissatisfaction against it, but the contents and the whole tone of the first applicant's letter of 3 January 2005 is inconsistent with his application having been rejected on 31 December 2004 and is more consistent with the first respondent's version of an explanation having been given to the first applicant about who was more eligible to administration.

[29] In my judgment the first respondent only made a decision on the first applicant's application on 28 January 2005 when the first respondent wrote to the first applicant informing him that:

> … looking at the present situation, the brother's (SIC) of the deceased position in the hierarchy under the administration of Estates Ordinance, Chapter 80 is at (d) of Section 8. Thus in order for your goodself to be entitled to apply for Letters of Administration, you shall need to be of a higher ranking in the hierarchy. However, being the stepson, the brother of the deceased's (SIC) position prevails. In view of the above, we regret to inform your goodself that your application for Letters of Administration to administer the above-named deceased's estate shall not be considered.

[30] It was in his letter of 28 January 2005 that the first respondent returned to the first applicant the relevant documents which had been submitted with his application which action, to my mind, goes to show that it was only on 28 January 2005 and not 31 December 2004 when the decision was made.

[31] During arguments, counsel for the first respondent submitted that this application for certiorari was made prematurely since the first respondent has not to date granted Letters of Administration to Tan Kim Eng's estate to Mr Peter Tan or anyone else. I see no merit in this submission. What the applicants are complaining about in this application is the first respondent's decision made on 28 January 2005, rejected the first applicant's application for administration. That is the decision which they seek to impugn. Accordingly, there is nothing premature about this application.

[32] I will now go on to consider whether in arriving at his decision to reject the first applicant's application for administration on 28 January 2005, the first respondent had failed to give the first applicant an opportunity to explain his case or was biased against the applicants.

[33] I find that the first respondent has not been guilty of the matters complained of. I say so for the following reasons. By the time he came to make his decision, the first respondent had before him the applications of both the first applicant and Mr Peter Tan. The first respondent had also personally met the first applicant on 31 December 2004 when he was questioned and had provided answers to the first respondent as to his (first applicant's) relationship to the deceased and was able to persuade the first respondent to consider his application before making any decision on it. Further, subsequent to that meeting the first applicant was also able to inform the first respondent in writing in his letter of 3 January 2005, as to why he believed that he was lawfully entitled to be granted administration of the estate, ie, as a 'child of the marriage' within the meaning of the expression in the the LRA.

[34] Accordingly, the first respondent was quite aware of the basis on which each of the applicants for administration were making their applications; he had seen and had also listened to the first applicant as well as afforded him an opportunity to state his position in the letter of 3 January 2005. I do not find that the first respondent can be said to have acted in breach of the rules of natural justice in arriving at his decision. So too regarding the allegation of bias. Here the first respondent had

A referred the question of the first applicant's eligibility to be granted administration to his legal department for advice before arriving at his decision. To me this does not indicate a biased mind.

B **[35]** It was said by the applicants that in arriving at his decision on 28 January 2005, the first respondent had acted on incorrect or misleading information contained in a document filed in support of Mr Peter Tan's application ie the Church's letter regarding the marital status of the deceased at the date of her death. I do not see anything in the point taken. While it is correct that the Church had written such a letter, it must not be overlooked that the first respondent was aware C from at least the 3 January 2005 when he received the first applicant's letter that the deceased was married to the late Henry Pang as stated in the letter which position the first respondent fully accepted, even before the Church wrote to rectify the matter. The first respondent has explained that is why in his letter of 28 January 2005, he had informed the first applicant that he (the first respondent) had considered the D provisions of the LRA and had gone on to say that while the first applicant could be considered as the 'child of the marriage' within the meaning of that term in that enactment, the brother of the deceased was still of higher ranking when applying for administration. I accept the explanation of the first respondent. If he had not accepted the fact that the deceased was married to the late Henry Pang at the date E of her demise, then there would be no need for him to consider the position of the first applicant as a 'child' of that marriage under the provisions of that enactment.

[36] Before leaving this subject it will be convenient to address two other submissions made by the applicants. The applicants complained that the first F respondent as a Probate Officer had exceeded his jurisdiction by probing into the rights and category of beneficiaries to the estate of Tan Kim Eng in the present action. According to the applicants, the function of the Probate Officer under s 3 of the Ordinance is to grant Letters of Administration to rightful persons and it is then incumbent on the Administrator so appointed, in accordance with s 17(c) of the G Ordinance to distribute the residue of the estate amongst the rightful beneficiaries according to the provisions of the Distribution Act, and not for the Probate Officer to determine these matters.

[37] While I agree with what the applicants say regarding the differences in the H functions and duties between a Probate Officer and an Administrator of a deceased's estate, I do not agree that the first respondent had erred in the manner alleged. As far as his letter of 28 January 2005 is concerned, it must be as obvious to the applicants as it is to me that when the first respondent made reference to the first applicant's position as a beneficiary to the estate, he was merely responding to the assertion made in the first applicant's letter of 3 January 2005 that he was a 'son' and accordingly a I beneficiary of the deceased's estate. And as far as these proceedings are concerned, it is the applicants who seek a declaration that they are the beneficiaries of the deceased's estate and the respondents are responding to the application. I do not think the first respondent has made any decision on the matter so that he can be said to have acted in excess of jurisdiction.

[38] The other matter complained about by the applicants was that despite the assertion made by the first applicant in his affidavit of 14 May 2005 that he had been informed by the persons there mentioned that the deceased Tan Kim Eng, Mr Peter Tan and his two sisters are not brothers and sisters of the whole blood, the first respondent has not made any attempt to clarify the issue with Peter Tan himself, by reason whereof the court should draw an adverse inference against the respondents for not doing so. With all respect I find this submission misplaced. In my view there is no good or valid reason to draw an adverse inference against the respondents. In the first place, it is not open to the applicants to take this point. The first applicant's allegation that the deceased and her brother and two sisters are not brothers and sisters of the whole blood was made well after leave to bring this application was granted. It was not a ground relied on for the grant of leave to bring this application and was only introduced for the first time on 14 May 2005 in the course of these proceedings and well after the first respondent had made his decision on 28 January 2005. In the second place, even if the applicants are allowed to take the point, when the first respondent made his decision on 28 January 2005 he had already been informed by the first applicant at their meeting on 31 December 2004 that the deceased died leaving surviving her a brother and two sisters as her next of kin, and, the first respondent had received the application of Peter Tan by 28 January 2005. There was thus nothing before the first respondent when he made his decision, to put him on any enquiry regarding the relationship between the deceased and her siblings. It is very strange that if the first respondent knew about the alleged relationship between the deceased and her siblings all this while, he did not inform the first respondent about it at their meeting on 31 December 2004, especially so when the first respondent had already revealed to him that the deceased's brother and sister were of a higher ranking and more eligible than him in administration.

[39] To me, the late stage at which this allegation was raised about the deceased and her siblings not being brothers and sisters indicates that it is an afterthought, raised solely to bolster this application. It is not raised bona fide. Be that as it may, I find the first respondent fully entitled to rely on what is stated in the birth certificates of the deceased and her siblings to refute what the first applicant alleges. What he alleges is a bare allegation unsupported and unsubstantiated by any evidence or documents whatsoever, whereas what is stated in the birth certificates of the deceased and her siblings regarding their common parentage being stated in an official contemporaneous document, sufficiently contradicts the bare assertion of the first applicant.

[40] With that I move on to consider grounds (iv) and (v) of the applicants' submissions ie the first respondent had failed to take into account relevant matters or had taken into account irrelevant matters, and, had misinterpreted the law in arriving at his decision.

[41] It was the submission of the applicants that in coming to his decision that the brother of the deceased enjoyed a higher ranking than the first applicant in the hierarchy of persons entitled to apply for administration of the deceased's estate as provided in the Ordinance, the first respondent had erred when he completely failed to take into account a relevant matter, namely, the position of the deceased Tan Kim

Eng as the secondary wife of the late Henry Pang according to Chinese custom. It is the applicants' contention that a Chinese man's right to have a plurality of wives according to his personal law has been recognised and given effect to by the courts in this country. It is the applicants' case that according to Chinese custom (and here I quote from counsel for the applicants) 'once a woman is married she is married into her husband's family and takes her husband's name. She is thereafter 'cut-off from her own family. She now belongs to her husband's family. All her properties would remain with her husband's family including her children who are members of the husband's family. Even if she remarries after the death of her husband, she is not allowed to take her children along with her'.

[42] In support of that proposition, counsel for the applicants referred me to the decision of the Court of Appeal in *Re Tan Soh Sim, Deceased; Chan Lam Keong & Ors v Tan Saw Keow & Ors* [1951] MLJ 21 where, when discussing the principles of Chinese Family Law, Taylor J, stated:

> Their whole system is based on the notion that the family, not the individual, is the unit for consideration. A person is either a member of the family or outside it. When a girl is married she leaves her father's house and goes to reside in the house of her husband's father or grandfather. Her first ceremonial duty is to worship at the family shrine and her second is to kowtow to her husband's parents and elders; then his juniors in the family kowtow to her. All this is symbolic of the fact that he has been married into the family and is expected never to leave it. If her husband should die, however young, his brothers will still maintain her for the rest of her life, provided always that she remains in the family house; if she were permitted to remarry she would not be allowed to take her children with her; they belong to their father's family and must be brought up to worship his ancestors. If she leaves the family, she leaves it completely and they have no further responsibilities towards her.

[43] Relying on what was stated in *Re Tan Soh Sim's case* regarding the Chinese family system, the applicants made two submissions. First, when the deceased Tan Kim Eng married their late father, she married into and became a member of the Pang family and by virtue of her marriage, whatever belongs to her belongs to the Pang family and this is not only limited to her properties or belongings but it also includes her children, if any. Secondly, according to the applicants, in a Chinese family, the children of the marriage would address the principal wife as 'first mother' and the secondary wife as 'second mother'. To the children, the wives of the family are all regarded as 'mothers'. To a wife in the household, the children are the members of the husband's family and are treated equally like her own, which according to the applicants is the unique fabric of a Chinese family which is a closely knit unit. Accordingly, counsel for the applicants went on to submit and I quote, 'In accordance to the Chinese custom, once the late Tan Kim Eng was married to the applicants' late father, she was married into the Pang family and belongs to the Pang family. The children in the Pang family are her children according to the Chinese custom and they are the 'children of the marriage' which was confirmed and agreed to by the respondents that the first applicant is the 'child of the marriage'. The same goes with the sons in the family, they are her sons under the Chinese custom and hence, the male heirs of the late Tan Kim Eng and they are entitled to the grant of Letters of Administration to administer her intestate estate'.

[44] I do not agree with the contentions of the applicants. I do not think the case of *Re Tan Soh Sim, Deceased,* is of any assistance to the applicants here. Counsel for the respondents has pointed out, and correctly in my view, that *Re Tan Soh Sim* was not a case about who could be granted letters of administration but rather a case which concerned the interpretation of a written instrument drawn up before Tan Soh Sim died in which instrument the relatives of Tan Soh Sim, who was the primary wife of one Chan, agreed to renounce all claims of whatever nature to the assets of Tan Soh Sim should she die intestate, in favour of four children adopted by the Chans and to the subordinate wife Boey Kee in the manner set out in the instrument. The effect of the renunciation was that all those who would be legally entitled to share on an intestacy, renounced everything in order to give the whole estate to parties who had no legal claim to any share. After Tan Soh Sim died the instrument was challenged by some of the signatories and supported by others. The estate then devolved upon the Official Administrator who, because of the dispute, could not distribute the property. So, he issued an originating summons praying for decision of the questions: Whether the instrument was valid? If so, how was the estate to be distributed? It was in this context that principles of Chinese family law were explained and applied. But the headnotes of the case clearly states that: 'Chinese Family Law, subject to modern and local modifications, is still the personal law of Chinese domiciled in the Malay States, except where excluded by express legislation eg, the Distribution Enactment' (Emphasis added). At p 25 and p 26 of the judgment this is what Taylor J, said on the matter:

> By the year 1930 a much higher proportion of the non-Malay population had become domiciled in the Malay States and the practical difficulty of administering a variety of personal laws, especially in relation to intestate succession, had greatly increased. This and other causes led to the passing of the Distribution Enactment (Now, Cap 71) which repealed the recognition Order in Council and introduced the main provisions of the English Statute of Distribution, 22 & 23 Charles II, Cap 10, to govern succession to the estate of every intestate (other than a Moslem) who died locally domiciled. This was not in any sense an attack on Chinese custom or on any other personal law. Testamentary freedom is absolute. The Chinese property-owning classes are accustomed to making wills and the practice is not uncommon among Indian and other communities. They were all put on the same basis and, granted a local domicile, there was no room for uncertainty. Everybody could give full effect by his will to his own personal views on family succession, customary or otherwise, and if he did not make a will, then the one statute applied irrespective of the community. But as regards other matters within the domain of the personal law, such as marriage, adoption and guardianship, the law of Perak reverted to the state in which it was before 1893 and the law of the other States remained in the same state as it had been in throughout namely, that in the absence of any statutory provision, the Courts applied the personal law of the community concerned.

[45] And at p 27 Taylor J, went on to make it very clear that:

> Chinese Family Law, though not unchanged, is still the personal law of locally-domiciled Chinese but it does not govern intestate succession of which other provision has been expressly made by statute;...

[46] So it will be seen that what was said in *Re Tan Soh Sim, Deceased*, about succession or distribution according to Chinese custom can be of no assistance to the

applicants because as will be seen shortly, succession to an intestate estate in Sarawak is governed by express legislation, namely, by the provisions of the Distribution Act 1958 ('the DA'). Likewise, in determining who is entitled to be granted administration of Tan Kim Eng's intestate estate, since there is express legislation on the matter under the Ordinance, the first respondent did not err when he did not take Chinese custom into account when arriving at his decision.

[47] The applicants also complained that in coming to his decision to reject the first applicant's application for administration, the first respondent had acted in an inconsistent manner, in that, while on the one hand the first respondent had stated in his letter of 28 January 2005 that he agreed that the first applicant could be considered as a child of the deceased in line with the definition of the expression 'child of the marriage' found in s 2 of the the LRA, yet on the other hand the first respondent was not willing to grant administration to the estate to the first applicant nor consider the applicants to be beneficiaries of Tan Kim Eng's estate because he and they were neither the male heir nor issues of Tan Kim Eng. According to the applicants, the first respondent should not be allowed to blow hot and cold on the matter.

[48] I do not agree with this submission. What the first respondent said about the first applicant being a 'child of the marriage' must be viewed and understood in its proper context. It must not be overlooked that when he said what he did, the first respondent was responding to an assertion made by the first applicant in his letter of 3 January 2005, that he was entitled to be granted administration of the estate because he was a 'child' of the deceased and beneficiary of her estate, in that, he was the eldest son of the late Henry Pang who was married to Tan Kim Eng. Therefore, according to the reasoning of the first applicant, he was also the 'child of the marriage' of the deceased as statutorily defined by the LRA. It is clear to me that the first applicant took this line of argument because in s 2 of the LRA the term 'child of the marriage' is defined to include a child of one party to the marriage accepted as one of the family by the other party. It was to reply to the above contention of the first applicant that the first respondent said what he did. When properly understood all that the first respondent was saying to the first applicant was simply this: That whilst he would agree that for the purposes of the the LRA the first applicant could be considered to be a 'child of the marriage' between the late Henry Pang and Tan Kim Eng by virtue of the definition of that expression in s 2 of that enactment, yet for the purposes of ascertaining who should be granted administration of Tan Kim Eng's estate and who the beneficiaries of her estate were, these were matters that had to be determined according to the provisions in the Ordinance and the DA.

[49] So I would say with all respect that what the first respondent had said about the first applicant being a 'child of the marriage' has been misconstrued and not interpreted in its proper context. Accordingly, the first respondent was not blowing hot and cold as alleged and neither has he taken an inconsistent stand on the matter.

[50] I will next consider the question whether the first respondent had misinterpreted the law as alleged. It is this question that really lies at the heart of this case.

[51] First, the law on the grant of letters of administration to the estate of a deceased person. Section 8 of the Ordinance sets out the persons entitled to letters of administration in their order of priority. The section reads:

> S 8 The following persons, if of full age and of sound mind, are entitled in the order stated to letters of administration to a deceased person's estate:
>
> (a) the deceased's widower;
>
> (b) the male heirs of the deceased;
>
> (c) the deceased's father;
>
> (d) the brother and brothers of the whole blood of the deceased;
>
> (e) the deceased's widow (or primary widow if more than one);
>
> (f) the deceased's nearest male relative;
>
> (g) the deceased's nearest female relative;
>
> (h) any creditor of the deceased, who shall enter into a bond for such amount and with such sureties, or has furnished such security, as the Probate Officer shall require.

[52] On the facts of this case, the respondents have taken the stand that in the hierarchy of persons mentioned in the section, the persons mentioned in category (a) and (c) do not come into consideration because Tan Kim Eng's widower is the late Henry Pang who is now deceased while Tan Kim Eng's father is also deceased. There is no dispute between the parties on this.

[53] Of the remaining persons named in s 8 who would be entitled to administer her estate, the male heirs of Tan Kim Eng have higher priority over her brother of the whole blood. It is the case of the respondents that Tan Kim Eng did not leave surviving her a male heir. According to the respondents an 'heir' has to be someone who succeeds the deceased by right of blood, which the first applicant is not, he being a stepson only to the deceased, having been born to the marriage between the late Henry Pang and the principal wife Ng Nyuk Lan. It is the respondents' stand that Mr Peter Tan, being the brother of the whole blood of the deceased Tan Kim Eng, is the person mentioned in category (d) of s 8 and more eligible than the first applicant to administration of her estate.

[54] In support of their contention that an 'heir' is someone who succeeds the deceased by right of blood, the respondents rely on the following definitions of the word 'heir'. In Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, by Henry Campbell Black (6th Ed), the word 'Heir Male' is defined as follows:

> In English Law, the nearest male blood-relation of the decedent, unless further limited by the words 'of his body', which restrict the inheritance to sons, grandsons, and other male descendants in the right line.

[55] The respondents also refer to *Mozley and Whiteley's Law Dictionary (10th Ed), Hardy Ivamy* [1988] Butterworths where 'Heir' is defined as:

A

> 1. At Common Law an heir was the person who succeeded by right of blood to any man's lands and tenements in fee ie the person whom, by right of blood, the law cast the real estate of the deceased person intestate.

[56] The applicants say the respondents have wrongly interpreted the words 'male heir' in s 8 of the Ordinance to mean someone related to the deceased by blood when there is nothing in the section to indicate that an 'heir' must be the biological son of a deceased person. By doing so the applicants say the first respondent has read into s 8 of the Ordinance a requirement which is not there, which it is not permissible to do since the Probate Officer is not a legislator (see *Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd & Ors Appeal* [2004] 3 MLJ 17 where Richard Malanjum JCA (as his Lordship then was) said: 'We do not think there should be any additional or prerequisite term to be read into the provision. To do so would tantamount to adding what is not in the statute. And that should not be done since judges are not legislators').

[57] In support of what they say, the applicants referred to the definition of the word 'Heir' in the following publications. In William C Burton's Legal Thesaurus (Macmillan Paperback Edition 1985) 'heir' means 'acceptor, after-comer, after-generations, allottee, beneficiary, consignee, descendant, devisee, donee, inheritor, inheritrix, legatee, one who inherits, parcener, payee, possessor of descent, posterity, receiver, recipient, scion, successor, survivor, transferee' (Emphasis added).

[58] And in Black's Law Dictionary with Pronunciations (Centennial Ed) 'heirs' is defined as follows:

> At common law, the person appointed by law to succeed to the estate in case of intestacy. One who inherits property, whether real or personal. A person who succeeds, by rules of law to an estate in lands, tenement, or hereditaments, upon the death of his ancestor, by descent and right of relationship. One who would receive his estate under statute of descent and distribution. Moreover, the term is frequently used in a popular sense to designate a successor to property either by will or by law. Word 'heirs' is no longer limited to designated character of estate as at common law (see also Descent (Applicants' emphasis).

[59] The applicants also referred to the word 'Descent' in Black's Law Dictionary, which defines the word as:

> Hereditary Succession. Succession to the ownership of an estate by inheritance, or by any act of law, as distinguished from 'purchase'. Title by descent is the title by which one person, upon the death of another, acquire the real estate of the latter as his heir at law. The title by inheritance is in all cases called descent, although by statute law the title is sometimes made to ascend... Descents are of two sorts, lineal and collateral. Lineal descent is descent in a direct or right line, as from father or grandfather to son or grandson. Collateral descent is descent in a collateral or oblique line, that is, up to the common ancestor and then down from him, as from brother to brother or between cousins' (Emphasis added).

[60] Relying on the above definitions of 'Heir' and 'Descent' the applicants contended that since s 8 of the Ordinance has expressly allowed administration to be granted to the deceased's 'collateral descent' ie 'the brother or brothers of the whole

blood', then the legislature must have intended the term 'male heir of the deceased' in s 8(b) of the Ordinance to mean 'male lineal descent', namely the son and grandson of a deceased. Accordingly, the applicants went on to argue that since the first applicant is regarded as a 'child of the marriage' under the the LRA, he is likewise a 'son' of the marriage and being a 'son' ie of lineal descent to the deceased, was her 'male heir' and therefore entitled to be granted administration of her estate. So, according to the applicants, it was wrong for the respondents to interpret the words 'male heir' in s 8 of the Ordinance as meaning a person related by blood to the deceased or her biological son.

[61] The applicants further submitted that in interpreting the word 'male heir' in s 8 of the Ordinance, the first respondent failed to consider s 3 and s 5 of the the DA which also applies to Sarawak, in which the word 'child' is also defined and where there is no requirement that a child under that legislation must be a biological or natural child. The applicants point out that under s 6 of the Distribution Act succession to the property of any person who dies intestate is determined in the manner set out there. To summarise s 6 very briefly, it states that distribution of the estate of a person who dies intestate is to be effected to the following persons in the following order of priority:

1 spouse;

2 issues;

3 parents;

4 brothers or sisters;

5 issues of brothers or sisters;

6 grandparents; and

7 uncles or aunts

[62] The applicants have gone on to submit that under s 6, the persons second in priority are the 'issues' of a deceased, and, in s 3 of the Distribution Actthe word 'issue' is defined to include 'children and the descendants of deceased children' and the word 'child' is defined to mean 'a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives but does not include an adopted child other than a child adopted under the provisions of the Adoption Act 1952 or the Adoption Ordinanceof the State of Sarawak'.

[63] In s 5 of the same Act, the persons who are related to a deceased are categorised and the section reads:

> For the purpose of distribution under this Act, there shall be no distinction between those who are related to the deceased person through his father and those who are related to him through his mother, nor between those who are related to him by the full blood and those who are related by the half blood, nor between those who were actually born in his lifetime and those who at the date of his death were only conceived in the womb but who have subsequently been born alive.

[64] Referring to what is stated in s 5, the applicants submitted that they are entitled to a share of Tan Kim Eng's estate because they are related to Tan Kim Eng through their late father by virtue of his marriage to Tan Kim Eng. Accordingly the applicants submitted that the first applicant was the 'male heir' of Tan Kim Eng, so it was wrong for the first respondent to say that neither the first applicant nor the other applicants are the issues and beneficiaries of Tan Kim Eng's estate nor entitled to administer her estate.

[65] To further support their contention that the first applicant is a 'child' and an 'issue' of Tan Kim Eng and hence her male heir even though he is only her stepson, the applicants rely on the definition of the word 'child' in s 7(11) of the Civil Law Act 1956('the CLA') where it is stated that 'child' includes 'son, daughter, grandson, grand-daughter, stepson and stepdaughter'. According to the applicants, the Civil Law Act was enacted in 1956, prior to the coming into effect of the DA and there is no express provision in the subsequent legislation ie the DA, showing any contrary intention of the legislature to exclude a stepson and stepdaughter under the definition of 'child'.

[66] Accordingly, the applicants urged the court to apply that principle of statutory interpretation which allows reference to other statutes in pari materia in interpreting the words of a particular statute. Counsel for the applicants referred to the Principles of Statutory Interpretation by Guru Prasanna Singh (9th Ed, 2004) where at p 254 the learned author states:

> ... A statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in para materia ie statutes dealing with the same subject-matter or forming part of the same system...

[67] Counsel for the applicants also relied on the author's reference to what Lord Mansfield said in *R v Loxdale* (1758) 97 ER 394 where he said:

> Where there are different statutes in pari materia though made at different times, or even expired, not referring to each other, they shall be taken and construed together as one and as explanatory of each other.

[68] Counsel for the applicants also referred to another passage at p 255 of the same publication where the author states:

> However, it is not necessary that the entire subject-matter in the two statutes should be identical before any provision in one may be held to be in pari materia with some provision in the other

[69] And also at p 257 where the learned author states:

> The application of this rule of construction has the merit of avoiding any apparent contradiction between a series of statutes dealing with the same subject; it allows the one of an earlier statute to throw light on the meaning of a phrase used in a later statute in the same context; it permits the raising of a presumption, in the absence of any context indicating a contrary intention, that the same meaning attaches to the same words in a later statute as

in an earlier statute if the words are used in similar connection in the two statues; and it enables the use of a later statute as parliamentary exposition of the meaning of ambiguous expressions in an earlier statute.

[70] Based on the above passages, the applicants submitted that although the DA and the LRA were made at different times and did not refer to each other, however, in order to ascertain the meaning of 'child' in the DA, both the aforesaid Acts shall be taken and construed together, as one system and explanatory of each other. Counsel for the applicants further submitted that based on the above passages, the applicants being the 'stepchildren' of the deceased, they shall be regarded to be the deceased's 'children', and such a position has been recognised since 1956 when the Civil Law Act was enacted when family members included, inter alia, stepsons and stepdaughters. Accordingly the applicants submitted that a blood connection is not a prerequisite to the applicants being regarded as children of the deceased since adopting such a stand would be contrary to a statutory provision, namely, s 3 of the DA which, according to the applicants, also accommodates for an adopted child who is a total stranger in the lineage of a deceased person.

[71] Accordingly the applicants submitted that the first respondent had misinterpreted both the Ordinance and the DA when he decided that the first applicant was not the male heir of the deceased and the applicants were not her issue.

[72] From the definition of the word 'heir' in the publications referred to by both parties, it is apparent to me that depending on the context in which the word 'heir' is used or is found in, the term is equally capable of referring to a person who succeeds to the property of a deceased by way of blood connection, as well as to a person who has no blood connection with a deceased. Thus, an 'heir' can be a devisee or legatee under a will or even a transferee (see *William C Burton's Legal Thesaurus*). It is not difficult to see that a devisee or legatee under a will need not necessarily be a blood relative of the maker of the will.

[73] In my judgment, the word 'heir' must be interpreted and take its meaning from the context in which it is used or found. In this case the word 'heir' does not fall to be interpreted in the context of a will. It falls to be interpreted in the context of a person dying intestate. Here the word heir' is found in a statute (the Ordinance) dealing with the due and proper administration of the estate of deceased persons and used in the context of s 8 which directs who has priority to be granted letters of administration of a person who dies intestate. Accordingly, it is my view that the words 'male heirs' are used in s 8 of the Ordinance to denote the persons whom by law would succeed to the property of a deceased person in the case of intestacy under a statute of distribution. This is consistent with the definition in Black's Law Dictionary with Pronunciations (Centennial Ed) where 'heirs' is defined as: 'At common law, the person appointed by law to succeed to the estate in case of intestacy'.

[74] Accordingly, to determine who a 'male heir' under the Ordinance is, the court should look at who are the persons appointed by law to succeed to the estate in case of intestacy. As far as Malaysia is concerned, the statute that governs the distribution

of the estate of a person who dies intestate is the DA which applies to Sarawak. As Imentioned earlier, s 6 of the DA sets out the persons in their order of priority, who can share in the distribution of property of a person who dies intestate. As far as it is relevant to the facts of this case, the 'issues' of a deceased as well as the 'brothers and sisters' of a deceased are persons who can share in the distribution of the estate of a deceased who dies intestate, except that his or her 'issues' enjoy a higher priority.

[75] The next question that must be asked is who is an 'issue' of the deceased? Must he or she be a blood-relation of the deceased? The term 'issue' as defined in s 3 of the DA to include children and the descendants of deceased children and the word 'child' is defined in the same section to also include a child who is adopted under the provisions of the Adoption Act 1952 or the Adoption Ordinance of Sarawak. Since an adopted child can come within the definition of 'issue' in s 3, it must follow that a blood-relationship is not a prerequisite before a person can be regarded as an 'issue' of a deceased person under the DA.

[76] Having said that, the matter does not end there because it must next be asked, do stepchildren qualify as 'issues' of a deceased within the meaning of that word in the DA? It is here that I have paid anxious consideration to the submissions of the parties and have come to a finding that they cannot be regarded so. I say so for the following reasons.

[77] In the first place, it will be recalled that the applicants argued that since the first applicant is regarded as a 'child of the marriage' under the LRA, he must also be regarded as a 'child' of the deceased under the DA and hence her 'issue'. I do not agree. The LRA and the DA serve completely different functions and purposes. The former enactment is an 'Act to provide for monogamous marriages and the solemnisation and registration of such marriages, to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto', whereas the DA is an 'Act relating to the law of distribution of intestate estates'. Given their different functions and purposes, it would be wrong to use a definition which serves the purposes of one enactment and apply it to the other. Further even on the principle of statutory interpretation referred to by Guru Prasanna Singh, it would be wrong to do so because these two enactments are not in pari materia by any stretch of the imagination and neither do they deal with the same subject matter nor form part of the same system nor are they part of a series of statutes dealing with the same subject so as to allow an earlier statute to throw light on the meaning of a phrase used in a later statute in the same context.

[78] What I have just said will apply with equal force to the applicant's submission that the definition of the word 'child' in s 7(11) of the the CLA should be used to interpret the word 'child' in the DA. Part III of the CLA in which the definition of 'child' appears deals with dependency claims and survival of causes of action in fatal accident cases which has nothing to do with the law of distribution of intestate estates. These two enactments do not form part of the same system nor are they part of a series of statutes dealing with the same subject. Accordingly it would be wrong to use the definition of 'child' in the CLA and apply it to the DA.

[79] In the third place, the applicants sought to argue that because s 3 of the DA states that a 'child' means, where the deceased is permitted by his personal law a plurality of wives, a child by any of such wives, and s 5 of the DA goes on to state that 'for the purpose of distribution under this Act, there shall be no distribution between those who are related to the deceased through his father and those who are related to him through his mother...', the first applicant and the other applicants must be regarded as the 'issues' of Tan Kim Eng. Put in another way, the applicants sought to argue that since they are related to the deceased Tan Kim Eng through their late father Henry Pang, they are to be regarded as 'children' within the definition of 'child' in s 3 and hence the 'issue' of Tan Kim Eng. I do not agree.

[80] There is a fundamental flaw in the way the applicants have interpreted s 5. That section when read properly refers to those who are related to the deceased through his or her father or mother, e.g. the deceased's grandparents, aunts, uncles, great grandparents etc. It is clear therefore that the words 'his' and 'him' in s 5 refer to the deceased person, but the applicants here have chosen to construe the words 'his' or 'him' as referring to the first applicant or themselves and to go on to argue that since they are related to the deceased Tan Kim Eng through their late father Henry Pang who was married to Tan Kim Eng they are her issue. With all respect such an interpretation and argument is untenable.

[81] In the fourth place, the legislature has expressly defined in s 3 the category of persons who may be regarded as a 'child' of the deceased for the purposes of the DA. It is noteworthy that an illegitimate child is excluded and so are adopted children, unless they are adopted under the Adoption Act 1952 or the Adoption Ordinance of Sarawak. A stepchild is not mentioned in the definition at all. In the face of such exclusion would it be right to read into the section a category of persons who are not there? I do not think so (see *Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd & Ors*).

[82] Learned counsel for the respondents submitted, and to be correct in my view, that if the legislature had intended to regard a stepchild as a 'child' for the purposes of the DA, it would have expressly done so, just as it has done in several other enactments, examples of which are:

(1) The Stamp Duty (Remission) (No 7) Order 2002 which defines the word 'child' as follows:

> (2) For the purpose of this Order, 'child' means a legitimate child, a stepchild or child adopted in accordance with any law.

(2) In the Pensions Act 1980, 'child' is defined as follows:

> 'Child' means a child of a deceased officer; (a) who is a child under twenty-one years of age and include –(i) a posthumous child, a dependant stepchild and an illegitimate child of the officer; and (ii) a child adopted by the officer under any written law relating to adoption or under any custom or usage, on satisfactory proof of such adoption; and (b) who is a child of any age and is mentally retarded or physically and permanently incapacitated and is incapable of supporting himself provided that such child is mentally retarded or physically and permanently incapacitated before the

A child reaches the age of twenty-one years; ['The words 'provided that such child is mentally retarded or physically and permanently incapacitated before the child reaches the age of twenty-one years' in this paragraph applies only to officers appointed to the public service after 15 May 1986 and to the dependants of such officers'].

B (3) 'Child' is also defined in the Pensions Adjustment Act 1980 as follows:

'Child' means a child of a deceased officer (a) who is a child under twenty-one years of age and includes, (i) a posthumous child, a dependant stepchild and an illegitimate child of the officer; and (ii) a child adopted by the officer under any written law relating to adoption or under any custom or usage, on satisfactory proof of such C adoption; and (b) who is a child of any age and is mentally retarded or physically and permanently incapacitated and is incapable of supporting himself.

(4) Further definition of the word 'child' can also be found in the Banking and Financial Institutions Act 1989 which defines the same as follows:

D 'Child' includes a stepchild and a person adopted as a child under any written law of Malaysia or of any country, territory or place outside Malaysia, or under any custom recognised by any class or category of persons in Malaysia or in any country, territory or place outside Malaysia.

(5) In the Sri Pahlawan Gagah Perkasa (Remembrance Allowance) Act 1990, E 'child' is further defined as follows:

'Child' includes a stepchild and a child adopted, before the death of the recipient, under any written law, custom or usage.

(6) The Bank Simpanan Nasional Berhad Act 1997 defines the word 'child' as F follows:

'Child' includes a stepchild and a person adopted as a child under any written law of Malaysia or of any country, territory or place outside Malaysia, or under any custom recognised by any class or category of persons in Malaysia or in any country, territory or place outside Malaysia.

G (7) In the Insurance Act 1996, 'child' is defined as follows:

'Child' includes an illegitimate child, a stepchild and a child adopted under any written law of Malaysia or of any place outside Malaysia, or under a custom recognised by a class of persons in or outside Malaysia.

H (8) The Employees Social Security Act 1969'child' is defined as follows:

(1B) 'Child' means a child of the deceased insured person; (a) who is a child under twenty-one years of age and includes; (i) a posthumous child, a dependent stepchild and an illegitimate child of the insured person; and (ii) a child adopted by the insured I person under any written law relating to adoption or under any custom or usage, on satisfactory proof of such adoption; and (b) who is a child of any age and is mentally retarded or physically incapacitated and is incapable of supporting himself.

(9) In the Development Financial Institutions Act 2002, the word 'child' is further defined as follows:

'Child' includes an illegitimate child, a stepchild and a child adopted under any written law of Malaysia or of any place outside Malaysia, or under any custom recognised by a class of persons in or outside Malaysia.

(10) In the Employees Provident Fund (Conduct and Discipline) Rules 1993 'child' is defined as follows:

'Child' includes a stepchild, an adopted child and an illegitimate child but does not include a child who is not dependent on the officer or servant.

(11) Section 48(9) of the Income Tax Act 1967further defines the word 'child' as follows:

In this section 'child', in relation to an individual or his wife, means a legitimate child or stepchild of his or his wife, or a child proved to the satisfaction of the Director General to have been adopted by the individual or his wife in accordance with any law.

(12) The Judges Remuneration Act 1971 defines 'child' as follows:

'Child' means a child of a deceased Judge; (a) who is a child under twenty-one years of age and incudes; (i) a posthumous child, a dependent stepchild and an illegitimate child of the Judge; and (ii) a child adopted by the Judge under any written law relating to adoption or under any custom or usage, on satisfactory proof of such adoption; and (b) who is a child of any age and is mentally retarded or physically and permanently incapacitated and is incapable of supporting himself.

[83] In the fifth place, following the decision in *Re Tan Soh Sim, Deceased,* since the DA is an express legislation and defines who is a 'child' is for the purposes of the enactment, the relationship between the first applicant and Tan Kim Eng according to Chinese custom is not relevant for the purposes of this application.

[84] Learned counsel for the applicants has submitted that if the court excludes stepchildren from the definition of a 'child' in the DA, it will produce a harsh and unjust result in this case. To this submission, I would refer to what was said by Seah SCJ in *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39, that 'The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction'. I believe this is what I have done in this case.

[85] In the result, for all the reasons I have given I find that a case has not been made out by the applicants for an order of certiorari to issue. The first respondent has not been guilty of any procedural impropriety in arriving at his decision and neither was he wrong in saying that the brother of the deceased enjoyed a higher ranking than the first applicant in applying for administration.

[86] With regard to the other declarations sought by the applicants, I refuse them all.

[87] I also refuse the order of mandamus sought by the applicants.

[88] Accordingly, I dismiss this application with costs to the respondents.

Application for an order of mandamus dismissed with costs.

Reported by Kenny Wong